No. 88-1618

Supreme Court, U.S.
FILED
MAY 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

Ernest V. PARISIEN,
D/B/A PARISIEN EXCAVATION,

Petitioner,

v.

TWIN CITY CONSTRUCTION COMPANY
OF FARGO, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF OF PETITIONER

YVONNE TERESA KNIGHT
Counsel of Record
MELODY L. MCCOY
KIM JEROME GOTTSCHALK
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302-6296
(303) 447-8760

THOMAS K. SCHOPPERT
SCHOPPERT LAW FIRM
Northland Professional Building
600 22nd Avenue, Northwest
Minot, ND 58701
(701) 852-1041

Counsel for Petitioner

May 1989

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF AUTHORITIES

Page(s)

CASES

Bradley v. School Bd. of Richmond, 416 U.S. 696 (1974) 4

Iowa Power & Light Co. v. Burlington Northern, Inc., 647 F.2d 796 (8th Cir. 1981) 4

Mississippi Band of Choctaw Indians v. Holyfield, ___ U.S. ___, 109 S.Ct. 1597 (1989) 3

Montana v. United States, 450 U.S. 544 (1981) 1

Sanders v. Robinson, 864 F.2d 630 (9th Cir. 1988) .. 2, 3, 4

Williams v. Lee, 358 U.S. 217 (1959) 2

STATUTES

2 T.M.C.T.C. §2.0102 3

OTHER AUTHORITIES

16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure §4031 3

No. 88-1618

In The

Supreme Court of the United States

October Term, 1988

Ernest V. PARISIEN,
D/B/A PARISIEN EXCAVATION,

Petitioner,

v.

TWIN CITY CONSTRUCTION COMPANY
OF FARGO, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF OF PETITIONER

INTRODUCTION

The Brief in Opposition confirms that guidance is needed in the proper application of this Court's cases to issues involving the civil jurisdiction of tribal courts over reservation-based actions brought by tribal members against non-Indians. Twin City Construction Company of Fargo (Twin City) argues that such issues are governed by *Montana v. United States*, 450 U.S. 544 (1981) *(Montana)*,

see Brief in Opposition at 5-7; 8-9; & 14, and not by *Williams v. Lee*, 358 U.S. 217 (1959), a case which specifically addresses the civil jurisdiction of tribal courts, and which Twin City does not attempt to distinguish.

ARGUMENT

Pursuant to Rule 22.5, in reply to the Brief in Opposition filed in this case by Twin City, petitioner Ernest V. Parisien (Parisien) hereby asserts the following:

1. Even assuming *arguendo* that *Montana* applies here, the result below and *Sanders v. Robinson*, 864 F.2d 630 (9th Cir. 1988) are in conflict, and Twin City's contentions to the contrary are in error. Twin City argues that enjoining Parisien from adjudicating his contract dispute in tribal court is not the kind of "direct effect" on tribal interests which under *Montana* would sustain jurisdiction. Brief in Opposition at 9-10.

However, the direct effect in this case could not be clearer: it involves the authority of tribal courts to resolve a dispute arising on tribal land from a subcontract between a tribal member and a non-Indian who was building a tribal school for attendance primarily by Indian students. This Court has long held that a tribe's governmental interest in exercising adjudicatory jurisdiction over an on-reservation civil cause of action involving a tribal member is sufficient to vest the tribe with such authority, notwithstanding the fact that a non-Indian is a party to the case. *Williams v. Lee*, 358 U.S. at 223. This case invokes the same essential tribal interests as were involved in *Williams v. Lee*, and in cases upholding tribal

court jurisdiction over the custody of Indian children, *e.g., Sanders v. Robinson; Mississippi Band of Choctaw Indians v. Holyfield*, ___ U.S. ___, 109 S.Ct. 1597 (1989).[1]

2. Twin City's characterization of the Tribal Court of Appeals' interpretation of the Tribal Code as involving an issue of federal law, not tribal law, is incorrect. Brief in Opposition at 2 & 13. In this case, in construing the scope of the Tribal Code, §2.0102, the Tribal Court of Appeals "borrowed" principles of federal law and common law and adopted them as rules of decision. (A-41 through A-42). Such borrowing of rules of decision from another forum does not transform an issue of purely tribal law into one of federal law. *See* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* §4031 (1977) (where state court, in interpreting state law, voluntarily incorporates federal rule of decision, such incorporation does not create original federal question jurisdiction).

3. Regarding the issue of deference to tribal courts on the tribal law issue, the procedural facts of this case and those of *Sanders v. Robinson* are identical. In both cases, the non-Indians raised an issue of purely tribal law: whether tribal court jurisdiction was prohibited

---

[1] Twin City also attempts to distinguish *Sanders v. Robinson* on the grounds that the Court of Appeals for the Ninth Circuit did not reach the issue of whether tribal court jurisdiction is exclusive or concurrent with that of state courts. Brief in Opposition at 10. However, that issue was not raised in *Sanders*, nor is it an issue in this case. Therefore, the fact that the Ninth Circuit did not reach the issue has no bearing on whether *Sanders* and the result below are in conflict.

under tribal law. In both cases, the highest tribal court construed the tribal law at issue. But unlike *Sanders*, the federal courts in this case failed to defer to the decision of the tribal court. Therefore, the result below is in conflict with the holding of *Sanders v. Robinson*, 864 F.2d at 633, that decisions of the highest tribal court on issues of purely tribal law are binding on the federal courts. Twin City's statement that this case and *Sanders* are not in conflict, Brief in Opposition at 12, is without merit.

4. Regarding the application of the amended Tribal Code, Twin City concedes that generally, courts of appeals must apply the law in effect at the time of their decision. Brief in Opposition at 13. However, Twin City attempts to invoke an exception to this rule – manifest injustice. *Id.* at 13-14. That attempt should be rejected, because that exception is inapplicable here.

This Court has held that retroactivity is essentially a question of legislative intent and that the manifest injustice exception only applies where the legislative intent is absent or ambiguous. *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711-716 (1974). In this case, the intent of the Tribal Council is clearly expressed in the amended code, and accordingly, courts should defer to it.

Moreover, even assuming *arguendo* that the legislative intent were unclear, Twin City has not shown that its rights would be unjustly impacted by the application of the amended code. For example, this is not a case where a party would be forced to relitigate the merits of a private dispute in a new forum after two and one-half years of litigation in another forum. *See, e.g., Iowa Power & Light Co. v. Burlington Northern, Inc.*, 647 F.2d 796, 805-807 (8th

Cir. 1981). Here, the dispute between Parisien and Twin City over the subcontract is unlitigated on its merits, and the Tribal Courts are the same forum in which the suit was initially filed.

Respectfully submitted,

YVONNE TERESA KNIGHT
Counsel of Record
MELODY L. MCCOY
KIM JEROME GOTTSCHALK
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302-6296
(303) 447-8760

THOMAS K. SCHOPPERT
SCHOPPERT LAW FIRM
Northland Professional Building
600 22nd Avenue, Northwest
Minot, ND 58701
(701) 852-1041

Counsel for Petitioner

May 1989